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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CESAR AUGUSTO KING, Defendant and Appellant.	A120528 (San Mateo County Super. Ct. No. SC058137A)

I. INTRODUCTION

A jury found Cesar King guilty of the second degree murder of Samuel Vasquez (Pen. Code, § 187).[1] The court sentenced King to a term of 16 years to life in prison. On appeal, King contends the trial court committed reversible error by (1) giving an erroneous instruction regarding the elements of self-defense; (2) failing to instruct the jury regarding the defense of justifiable homicide; (3) failing to instruct the jury that it could have found him guilty of involuntary manslaughter or voluntary manslaughter based on evidence of voluntary intoxication; and (4) failing to adequately respond to a question from the jury about the relevance of evidence of King's voluntary intoxication. We reject all of these contentions and, therefore, affirm the judgment.

[1]Undesignated statutory references are to the Penal Code.

II. STATEMENT OF FACTS

A. *Background*

Samuel Vasquez was a "coyote," a person who smuggles undocumented immigrants into the United States. In June 2004,[2] Vasquez brought Ruth Miranda into the country from Guatemala. Miranda, who was 17-years-old at the time, agreed to pay Vasquez from wages she would earn in America.

On the evening of June 29, Vasquez and Miranda arrived at the home of Mardoqueo and Patricia Vasquez, who lived in an apartment in San Mateo.[3] Vasquez was married to Mardoqueo's sister and was also Patricia's second cousin. Vasquez and Mardoqueo began drinking beers during dinner. Victor Gurrola, who rented a bedroom in the apartment, came home around 9:00, and had a few beers with the group before he went to bed at around 11:00 p.m.

Vasquez and Mardoqueo stayed up drinking until around 2:00 a.m. At some point, Vasquez went to sleep on the living room floor. Miranda slept on the living room couch.

Appellant King rented a bedroom in Mardoqueo's and Patricia's apartment, which he shared with Gurrola. There was conflicting testimony at trial as to whether King went home on the evening of June 29. Mardoqueo, Patricia and Miranda all testified that King did come home after dinner and that he joined in the drinking. However, Mardoqueo had previously testified, at the preliminary hearing, that King was not present that night. Gurrola testified that King was not present on the evening of June 29, but came home early the next morning.

B. *The Events of June 30*

The evidence is undisputed that King was present at the apartment and drinking with Vasquez and Mardoqueo on the morning of June 30. Miranda testified that the three men were already drinking when she woke up that morning. Gurrola testified that King

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[2] Date references in our Statement of Facts are to the 2004 calendar year.

[3] We refer to Mardoqueo and Patricia by their first names because they share the victim's last name.

and Mardoqueo asked him to go buy beer before he went to work. Gurrola purchased a 12-pack of beer for the group and then left for work sometime before 10:00 a.m.

Around 1:30 p.m., Patricia and Miranda left the apartment to run errands, leaving behind the three men who were still drinking. Mardoqueo testified that, at some point during the afternoon, King and Vasquez began to argue. Mardoqueo could not recall the precise subject of the argument, but it had to do with who was better at something and, at one point, King began "boasting that he was self employed" and that he did not have a "boss." Mardoqueo testified that King threw the first punch and Vasquez responded in kind. Mardoqueo made several unsuccessful attempts to separate the fighters and finally pushed King out the front door, forcing him to leave. Mardoqueo testified that both men wanted to keep fighting but he pushed King out the door because "he was the most stubborn and aggressive" of the two. Then Mardoqueo went to sleep in his bedroom and left Vasquez in the living room.

At around 3:20 p.m., David Diaz was driving a Roto-Rooter van on the street outside King's apartment when King flagged him down. King had blood on his face that appeared to come from his nose and there were blood stains on his shirt. King told Diaz to call 911 because he had just been "beaten by a coyote." Diaz placed the 911 call at 3:23, but did not wait. When the paramedics and police arrived, they were unable to locate an assault victim.

About an hour later, Patricia and Miranda returned home. Patricia testified at trial that she had seen King across the street from their apartment building, either sitting on the steps or walking, but she did not approach or talk to him. As she approached her unit, Patricia noticed blood near the window to King's bedroom and looked through the window and saw broken beer bottles in the room. The women went inside the apartment and found Vasquez asleep, stomach down, on the living room floor. There were scratches on his arm and Patricia asked him what happened without actually trying to wake him. Vasquez did not respond. Patricia went to her bedroom and Miranda went to the sofa in the living room where she had slept the night before.

Between 5:00 and 5:30 p.m., Leodan Orozco was driving home from work when he saw King walking down the street not far from his apartment. Orozco, who had worked on construction jobs with King, could see that King was injured, so he stopped his car at the light and waited for King to approach. King's lip was swollen, one eye was purple and there was some blood near his nose. King asked for a ride home so he could get his cell phone. He said that he had "gotten in some problems with friends where he lived at," and he told Orozco that "this is not going to end like this." King appeared "somewhat" drunk and Orozco suggested that he get his phone later when he was in better shape. Nevertheless, Orozco drove King to his apartment and King asked him to wait.

Meanwhile, Miranda, who was tired from her outing with Patricia, had gone to rest on the living room couch across from where Vasquez was asleep on the floor. Miranda testified at trial that she was "not fully awake" when she heard a knock at the front door. Miranda did not answer the door, nor did she respond to a knock on the window to King's bedroom. A few minutes later, King came out of the bedroom carrying a "stick." King walked "directly" to Vasquez who was sleeping on the floor and struck him on the back of the head with the piece of wood two or three times. Vasquez did not move, Miranda stood up and told King not to hit Vasquez. Miranda testified that King responded "Shut up. If not, I'm going to give you one just like I gave him one." Miranda was frightened and sat back down on the couch. King gave Vasquez "another blow to the head and then left" the apartment.

Patricia came out of her bedroom to see what was going on. She testified at trial that she became concerned after hearing a "very strong sound" which she described as a "blow" and like "wood hitting another wood." Patricia found Miranda on the couch and Vasquez on the floor where she had last seen him. She went to Vasquez, touched his head and saw that he had a "very big hole" in the back of his head. Patricia testified at trial that Miranda told her that the "young man" had hit Vasquez with a stick.

Meanwhile, King came out of his apartment building just as Gurrola was arriving home from work. Gurrola testified at trial that King came running out of the building

carrying a big stick. King did not say anything, but put his index finger in front of his lips as a signal for Gurrola to keep quiet. Orozco testified that King got into his car, carrying a "two by six," and asked Orozco to take him to his girlfriend's house. Orozco asked "What have you done?" King did not answer the question, but said to take him to his girlfriend's apartment. King did not say anything else during the drive. When he got out of the car, he took the piece of wood with him.

Paramedics arrived at the apartment at 5:52 p.m., but Vasquez was declared dead at 6:23 p.m. During a protective sweep of the apartment officers found Miranda hiding under a cover in the back bedroom. Miranda was escorted outside and left to wait with an officer who asked her, in Spanish,[4] if she had seen anything. Miranda responded that a man had hit Vasquez in the head. As she gestured by raising her own hands over her head and then bringing them down in front of her, Miranda saw that the officer was holding a photograph of King. She told the officer that the man in the picture was the person who had hit Vasquez.

D. *The Case Against King*

King was arrested at his girlfriend's apartment in San Mateo. During an interview following his arrest, King told police that, the previous night, he drank with Mardoqueo and another person he referred to as a coyote. The next morning, the drinking resumed and he and Mardoqueo got in a fight. Mardoqueo hit him in the face with a broken beer bottle and then he left the apartment. Initially, King maintained that only he and Mardoqueo had been in a fight, but eventually King admitted that Vasquez had also participated. King said that he had not wanted to fight and claimed that he never did hit Vasquez. King also repeatedly denied that he returned to the apartment later that day. He said he did not return because he had injured his foot and could not walk. Although officers observed that King had abrasions on his face, hands and upper body, he did not have any injuries to his feet.

[4] At trial, Miranda, Mardoqueo, Patricia and Gurrola all used an interpreter and testified in Spanish.

Police took a blood sample from King at 2:00 a.m. on the morning after his arrest. The blood sample was tested twice and both tests were negative for the presence of alcohol. Using these results to extrapolate back to 5:30 p.m. the previous day, King's blood-alcohol level could have been as much as 0.17 or as little as 0.00.

Police took a urine sample from King at 2:20 a.m. on July 1. The urine sample was screened twice for alcohol. One test indicated a blood-alcohol level of 0.079, while the other reflected a blood-alcohol level of 0.04. These tests could not be used to ascertain a blood-alcohol level at a given time because they were a first void sample and, in order to obtain time specific data, the subject must empty his bladder, wait a given time and then give a second void sample which can be tested. Because the testing in this case was performed on a first void sample, the results indicated only that, at some time prior to 2:20 a.m. King's blood-alcohol level may have been as high as 0.079. The People presented expert testimony at trial that urine tests for blood-alcohol levels are generally less accurate than blood tests, and that a test on a urine sample which is not a "properly collected second void" is "nearly worthless."

Investigators found a sliver of wood at the murder scene. They also recovered a two-by-six wood board with a missing corner from King's girlfriend's apartment. Red paint markings appeared on both the board and the sliver of wood and the two pieces appeared to fit together. The People presented expert testimony that the sliver of wood recovered from the murder scene came from the wood board recovered from King's girlfriend's apartment. Furthermore, blood that stained both pieces of wood belonged to Vasquez.

The cause of Vasquez's death was blunt force trauma to his head. Vasquez also had numerous abrasions on the left and right side of his face and head that he received while alive, some time within a three day period before his death. The wounds to the back of the victim's skull were consistent with being hit with a 2 inch by 6 inch board and indicated that Vasquez was struck between one and three times. Dr. Thomas Rogers, who performed Vasquez's autopsy, testified at trial that he could not determine whether Vasquez was standing or lying down when he was struck, but that he likely died within

three to five minutes after he was hit in the back of the head. At the time of his death, Vasquez's blood alcohol level was 0.29. Dr. Rogers testified that many people with that blood alcohol level are rendered unconscious although some people are still capable of walking when they are that intoxicated.

D. ***The Defense Case***

The defense called 85-year-old Jack Burleson to testify regarding King's good character.[5] Burleson, who ran a business servicing Laundromats in apartment buildings, testified that he had known King for more than five years. They met when King was part of a crew that painted Burleson's house. King did a great job and Burleson hired him to do "on-call" work for him. Burleson testified that King was not violent and that he never saw King drink or get in a fight. King was a calm person who did not get angry. Burleson considered King to be like a son and King called him father.

Burleson testified that King was supposed to work with him on a job on June 30. Burleson had given King his truck so that King could pick him up in the morning. But King did not show up and did not answer the phone when Burleson called him. Eventually, Burleson went and got the truck from outside King's apartment and went to the job alone. King, who testified in his own defense, also testified that he was supposed to work for Burleson on June 30.[6]

King testified that he spent the night of June 29 at his girlfriend's apartment and then went to his apartment the next morning to prepare to go to work. Mardoqueo came

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[5] The defense also offered evidence of a June 1999 domestic violence report against Vasquez. Vasquez had admitted to police that he hit the mother of his infant child four times with a belt to her back because he was angry that she had tapped the baby's head and pushed the baby's chair. Vasquez said he was sorry for what he had done and that he was not thinking when he did it.

[6] As part of its rebuttal case, the People presented evidence that, during the investigation, Burleson told police that King was not supposed to work for him on June 30. Burleson had reported that he went to King's apartment at around 3:00 p.m. that afternoon to retrieve his truck, which he had previously loaned to King. In the back of the truck, Burleson found a wallet with identification for Fidencio Vasquez-Lopez, which he later gave to police. Burleson also found a 12-ounce bottle of Corona beer, which he drank.

in his room and offered him a beer. Initially, King declined the offer, but then he agreed to stay and drink with Mardoqueo. The two started drinking at around 8:00 a.m. and Vasquez, who King had never met before, joined them. While they were drinking, King received messages on his cell phone and told the other two men he had to go to work. Mardoqueo said the messages were not from work but from King's girlfriend. When Vasquez learned that his own cousin was King's girlfriend, he told King not to "mess" with her. Although King said he was not doing that, Vasquez became angry and said King should not be with his cousin.

King testified that he said that, if Vasquez started a fight, he would call the police and tell them that Vasquez was a coyote. By this time, King had consumed 11 or 12 beers and Vasquez had drunk 10 beers. Vasquez became angry and broke a bottle against King's right temple, King fell to the floor and Vasquez held the broken neck of the bottle over him. King tried to get away but Vasquez would not let him.

King testified that Mardoqueo tried to stop Vasquez, but Vasquez started fighting with him as well. During the fight, Vasquez kicked and punched King and held him by the hair. At one point when Vasquez was on top of him, King scratched Vasquez with his fingers. Eventually, Mardoqueo grabbed Vasquez and King escaped out the front door.

King admitted that he returned to his apartment later that day to get his cell phone. The front door was locked and nobody answered his knock, so he climbed through his bedroom window. King was looking for his phone when Vasquez came into his room with a broken bottle in his hand. King tried to leave, but Vasquez would not let him and said "You are not going nowhere. I'm going to kill you. . . . You will call the police. You don't go nowhere." As King tried to get out the front door, Vasquez hit him and stabbed at him with the broken bottle. When King did get the door open, Vasquez said: "I kill people before. Don't open the door."

King became so distraught during his trial testimony that the court ordered a recess. After the break, King testified that he was on his knees by the front door as Vasquez held him by his shirt and threatened him with the broken bottle. Vasquez told

King he could not leave and King was afraid for his life. King grabbed a piece of wood that was by the door and tried to hit Vasquez with it. When Vasquez took a couple of steps back, King hit him on the back of the head and, when Vasquez fell, King ran out the door. King testified that he hit Vasquez so that he could get away.

III. DISCUSSION

A. *Self Defense Instruction*

King contends that the trial court committed reversible error by mis-instructing the jury regarding the elements of self defense.

1. *Background*

The People's list of proposed jury instructions, filed on September 25, 2007, did not include a self defense instruction. On October 11, 2007, the defense filed a list of additional proposed instructions which included CALCRIM No. 505, the Judicial Counsel's standard instruction addressing the subject of "Justifiable Homicide: Self Defense or Defense of Another."

Near the end of trial, the court held several off-the-record sessions with counsel to discuss and resolve issues pertaining to jury instructions. Then, on the morning of October 17, 2007, the court identified the instructions that would be given and counsel stated objections for the record. During that proceeding, the court stated that it would give CALCRIM No. 505 and neither party objected.

The jury was given the following version of CALCRIM No. 505, modified to fit the facts of this case:

"The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self defense. The defendant acted in lawful self defense if:

"1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury;

"2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; AND

"*3. The defendant used no more force than was reasonably necessary to defend against the danger.*

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. *The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.*

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"If you find that Samuel Vasquez threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self defense measures against that person.

"A defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death/great bodily injury has passed. This is so even if safety could have been achieved by retreating. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter." (Italics added.)

2. *Analysis*

King contends that CALCRIM No. 505 contains an erroneous statement of the elements of self defense and that the trial court committed reversible error by using it to instruct the jury in this case.

As a preliminary matter, we reject the People's contention that the doctrine of invited error bars this claim. That doctrine applies when the record shows that trial counsel made a "conscious, deliberate tactical choice between having the instruction and not having it." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Here, the record shows that defense counsel made no such choice. Indeed, under the circumstances of this case, the trial court had a sua sponte duty to instruct regarding self defense. (See *People v. Breverman* (1998) 19 Cal.4th 142, 157; see generally 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 616 p. 880.) And, CALCRIM No. 505 is the standard Judicial Counsel instruction on this subject. There is no indication in this record that defense counsel requested this standard instruction for some tactical reason.

King's substantive challenge to CALCRIM No. 505 pertains to the third element of self defense which is described in the italicized language in the instruction quoted above. King contends that self defense does not have a third element requiring that the defendant have used no more force than reasonably necessary to defend against the danger. King is mistaken.

Our Supreme Court has expressly stated that "any right of self-defense is limited to the use of such force as is reasonable under the circumstances." (*People v. Pinholster* (1992) 1 Cal.4th 865, 966; see also *People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065 [quoting language from *Pinholster*].) Ample other authority also supports the challenged language in this CALCRIM instruction. (See, e.g., *People v. Clark* (1982) 130 Cal.App.3d 371, 377 ["any use of excessive force is not justified and a homicide which results therefrom is unlawful"], disapproved on other ground in *People v Blakeley* (2000) 23 Cal.4th 82, 92; *People v. Whitfield* (1968) 259 Cal.App.2d 605, 609 ["Any force which is excessive i.e., unreasonable under the circumstances, is not justified and the extent to which one may make resistance against an aggressor is a fact to be determined by a jury"]; *People v. Young* (1963) 214 Cal.App.2d 641, 646 ["use of excessive force destroys the justification, but the question of whether there was such an excess is ordinarily one of fact for the jury to determine']; see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 72, p. 407, and authority cited therein.)

King complains that the "Bench Note" for CALCRIM No. 505 erroneously cites *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*) as authority for the elements of self defense set forth in the instruction. According to King, *Humphrey* supports only the first two elements identified in the standard instruction. This argument leads nowhere. First, regardless whether *Humphrey* supports the third element listed in CALCRIM No. 505, the authority cited above establishes that the reasonable force requirement is an element of self defense. Second, the issue in *Humphrey* was whether evidence of battered woman's syndrome was relevant to prove self defense. Thus, although the case discusses self defense, it does not resolve or even address any controversy regarding the elements of that defense. Finally, we find no language in *Humphrey* creating any doubt about the propriety of the requirement that a defendant must have used no more force than was reasonably necessary to defend against the danger.[7]

King begrudgingly concedes that our Supreme Court has "on occasion" approved the rule prohibiting the use of excessive force by a defendant claiming self defense. However, King would like to limit the application of this rule to a category of cases from which he excludes his own. To this end, King traces the reasonable force requirement to *People v. Clark, supra,* 130 Cal.App.3d 371, a case he categorizes as involving a situation in which the defendant's assailant (i.e., the victim) committed only a misdemeanor assault, in response to which the defendant used lethal force. King then attempts to convince us that the California Supreme Court has only approved the reasonable force requirement in cases like *Clark*. Therefore, King concludes that the requirement that a defendant not use excessive force applies only in cases like *Clark*, "situations where the victim committed only a misdemeanor assault before the defendant

[7] King contends that Justice Brown's concurring opinion in *Humphrey* "confirms" that there are only two requirements for proving self-defense. (Citing *Humphrey, supra,* 13 Cal.4th at p. 1093.) King overlooks the fact that Justice Brown expressly stated that " '[i]n defending himself, however, a person may use only that force which is necessary in view of the nature of the attack . . . . [Citation.]' [Citation.]" (*Id*. at p. 1094.)

used lethal (or potentially lethal) force," but not in cases in which the person attacking the defendant committed an "aggravated assault posing an imminent threat of death as well as great bodily injury."

King's selective and self-serving case analysis is not useful. It is neither surprising nor particularly noteworthy that many of the cases that expressly apply the excessive force limitation involve situations where the victim committed a misdemeanor in response to which the defendant used lethal force. None of King's case authority holds nor intimates that this rule applies only in that discrete context. Indeed, King fails to identify a single case which expressly or implicitly addresses the instructional issue raised here. The authority we cite above does directly support the third element of self defense which is set forth in CALCRIM No. 505.

King's conclusion, that the rule against the use of excessive force applies *only* when the victim committed a misdemeanor assault, is not only unsupported by legal authority, it is factually unsound. The nature of the victim's conduct is itself a factual issue, to be decided by a jury, not by instruction. Indeed, that factual issue is inextricably tied to the jury's determination whether the defendant used more force than necessary under the circumstances. We underscore the jury's role in this process because it appears to us that King's argument is nothing more than a backdoor challenge to the jury's implicit finding that he used more force than was reasonable under the circumstances.

King next contends that the CALCRIM No. 505 requirement that the defendant have not used more force than was reasonable under the circumstances conflicts with the settled law that "actual danger is not necessary to justify self-defense." (*People v. Mayfield* (1997) 14 Cal.4th 668, 780 (*Mayfield*). As the *Mayfield* court explained, " '[i]f one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer bodily injury, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether the danger is real or merely apparent.' " (*Ibid*.)

Contrary to King's contention, CALCRIM No. 505 is consistent with the principles discussed in *Mayfield*. It instructs the jury that the defendant claiming self-defense must have used no more force than was "reasonably necessary" to defend against the danger and that the defendant was entitled to use "that amount of force that a reasonable person would believe is necessary in the same situation." By using a reasonableness standard to qualify the required finding of necessity and by expressly instructing the jury to take account of the specific circumstances as they would appear to a reasonable person, this instruction accurately reflects that actual danger of death or great bodily injury need not be found.

King also contends that the reasonable force limitation imposed by CALCRIM No. 505 conflicts with the law establishing that a defendant is not required to retreat. King points out that "[i]t is the settled law of this state that one who without fault is exposed to a sudden, felonious attack need not retreat; he may in the exercise of his right of self-defense stand his ground and slay his assailant. [Citations.]" (Quoting *People v. Holt* (1944) 25 Cal.2d 59, 63; see also *People v. Hecker* (1895) 109 Cal. 451, 467.)

Apparently, King overlooks the fact that CALCRIM No. 505 expressly instructs the jury that a defendant claiming self defense is not required to retreat. As we have already explained, CALCRIM No. 505 does not impose a requirement of absolute objective necessity, but instead requires that the defendant have used no more force than was *reasonably* necessary. This instruction also expressly elucidates what reasonableness means in this context by instructing the jury that "[a] defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death/great bodily injury has passed. This is so even if safety could have been achieved by retreating."

To summarize, King has failed to establish that the trial court erred by instructing the jury with CALCRIM No. 505. Contrary to King's contentions on appeal, the third element of self defense that is set forth in CALCRIM No. 505 accurately reflects California law on the subject.

B. ***Failure to Instruct on "Justifiable Homicide to assault with a Deadly Weapon"***

King argues the trial court erroneously failed to instruct the jury that the homicide was justifiable if King killed Vasquez while resisting the commission of a forcible and atrocious felony.[8] King's claim of prejudicial error rests on three inter-dependent propositions, each of which is flawed.

First, King mistakenly contends that resisting a forcible and atrocious felony is a distinct defense from self-defense. In fact, it is one of three statutorily recognized circumstances supporting a finding of justifiable homicide based on self defense. Section 197, subdivision (1), states that "[h]omicide is . . . justifiable when committed by any person . . . [w]hen resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person . . . ." Although this statute refers to any "felony," case law establishes that not just any felony will support a finding of justifiable homicide in self defense. (*People v. Ceballos* (1974) 12 Cal.3d 470, 478; *People v. Jones* (1961) 191 Cal.App.2d 478, 481-482.) Instead, the defense of self defense is only available in cases in which the defendant resisted commission of a forcible and atrocious felony. (*Ibid*.)

King's second proposition is that he was entitled to a separate instruction on justifiable homicide to resist a forcible and atrocious felony because (1) there was substantial evidence that he killed Vasquez while resisting the commission of an assault with a deadly weapon (a beer bottle), and (2) assault with a deadly weapon is a forcible and atrocious crime. We accept, for purposes of argument, that there was substantial evidence that King killed Vasquez while resisting the commission of a forcible and atrocious felony. However, as discussed above, resisting such a felony is not an

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[8] We reject the People's contention that King forfeited this claim of error by failing to raise it in the trial court. A criminal defendant forfeits an appellate challenge of instructional error with respect to a basic principle of law only if "[t]he record . . . reflect[s] that counsel had a deliberate tactical purpose" in failing to object to a proposed instruction and " 'deliberately caused the court to fail to fully instruct.' " (*People v. Avalos* (1984) 37 Cal.3d 216, 229; see also *People v. Tapia* (1994) 25 Cal.App.4th 984, 1030-1031.)

independent defense requiring separate instruction. It is a form of self defense. (§ 197; *Ceballos, supra,* 12 Cal.3d 470.)

CALCRIM No. 505, the self defense instruction that we have already discussed, was written to "provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes." (CALCRIM No. 505 (LexisNexis 2008) Commentary, p. 231.) Therefore, for example, the form instruction contains the following description of the first element of self defense:

"1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____, <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <*insert other forcible and atrocious crime*>)];" This language in CALCRIM No. 505 reflects that resisting the commission of a forcible and atrocious felony, like resisting an attempt to murder or to commit great bodily injury, can support a finding of justifiable homicide in self defense.

In the present case, the trial court was not asked to and did not use the bracketed language from the CALCRIM No. 505 form instruction that refers to the commission of a forcible and atrocious felony. Although King complains that this optional language was omitted, he makes no effort to articulate how the omitted language could conceivably have affected the outcome of this case. The alleged assault with the beer bottle was not a potential independent justification for King's conduct. Rather, it was the very conduct that allegedly led King to fear death or great bodily injury. Indeed, there is absolutely no doubt that the jury understood that the source of King's claimed fear of death and or great bodily injury was that Vasquez was attacking him with the broken beer bottle. Thus, there is no likelihood that including express language about resisting a forcible and atrocious felony in the self defense instruction that was given to this jury would have changed the outcome of this proceeding.

King's third proposition, and the crux of his claim of error on appeal, is that the evidence that he resisted a forcible and atrocious felony entitled him to a substantively

different instruction than CALCRIM No. 505. Specifically, King argues that he was entitled to an instruction that he was not guilty of murder if he "reasonably believed that he was in danger of being assaulted with a deadly weapon and that his own use of deadly force was necessary to defend against that danger."

As we have already explained, resisting a forcible and atrocious felony is a form of self defense and CALCRIM No. 505 is an accurate statement of the law of self defense. King fails to cite any authority which expressly or implicitly holds otherwise. Thus, he also necessarily fails to provide authority for his newly proposed instruction which eliminates several requirements of self defense that appear in the CALCRIM No. 505 instruction. For example, King would except himself from the requirement that the defendant must have perceived an "imminent danger," and that the defendant must have reasonably believed that the "immediate" use of deadly force was necessary to defend against the danger. Not surprisingly, King omits altogether the third element of self defense, that the defendant may not have used more force than was reasonably necessary.

King concedes that the "traditional doctrine of justifiable homicide in self-defense is contingent upon objective evidence of an actual and reasonable fear of the imminent danger of death or great bodily injury." However, King contends that "where the assailant attempts or commits a forcible and atrocious crime the danger of death or great bodily injury is presumed." In other words, King attempts to convince us that resistance to a forcible and atrocious felony is a separate defense from self defense because, in the former situation, the defendant enjoys a presumption that he acted in self defense. This argument is not only illogical, it is unsupported by the single case upon which King mistakenly relies, *Ceballos*, *supra*, 12 Cal.3d 470.

In *Ceballos*, the defendant was convicted of assault with a deadly weapon after a trap gun that he mounted in his garage discharged a bullet into the face of a teenager who broke into the defendant's garage. On appeal, the defendant argued, among other things, that he acted in lawful defense of his property because, had he been present, he would have been authorized by section 197 to shoot the victim in order to resist commission of a felony. The *Ceballos* court disagreed. The court explained that "[b]y its terms

subdivision 1 of Penal Code section 197 appears to permit killing to prevent any 'felony,' but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable. [Citations.]" (*Ceballos, supra*, 12 Cal.3d at p. 477-478.) Therefore, the court approved lower court authority that had construed section 197 in light of the common law limitation that a killing or use of deadly force to prevent a felony could be justified only if the offense was a "forcible and atrocious crime." (*Id*. at p. 478.) Ultimately, the court concluded that the victim in the case before it did not commit a forcible and atrocious crime. (*Ibid*.)

Contrary to King's contention on appeal, the *Ceballos* court did not expressly nor implicitly hold that a defendant who uses deadly force to resist a forcible and atrocious felony is entitled to an evidentiary presumption that he acted in self defense. King points out that the *Ceballos* court stated that the reason resisting a forcible and atrocious felony can be self defense is that "[i]n such crimes 'from their atrocity and violence[,] human life [or personal safety from great harm] either is, or is presumed to be, in peril' [Citations]." (*Ceballos, supra*, 12 Cal.3d at p. 478.) However, this observation by the court was an explanation for *narrowing* the scope of the statutory right to use deadly force to resist the commission of a felony. Interpreting this language as expanding the scope of that defense, as King does here, is patently unreasonable.

Ceballos does not hold nor intimate in any way that the traditional doctrine of self defense is substantively altered in favor of the defendant who claims to have used deadly force to prevent a felony. The *Ceballos* court did not re-write the elements of self defense based on a claim of resistance to a forcible and atrocious felony. Those elements are accurately set forth in the CALCRIM No. 505 instruction that was given to the jury in this case.

To summarize, we hold that resisting a forcible and atrocious felony is a form of self defense addressed in and covered by CALCRIM No. 505. Further, under any standard of prejudice, optional language in CALCRIM No. 505 that expressly refers to resistance to a forcible and atrocious felony could not have affected the outcome of this

proceeding. Finally, the felony resistance instruction that King now claims the trial court should have given is not supported by California authority and would properly have been rejected even if King had proposed it to the trial court.

C. *Voluntary Intoxication*

King contends that the instruction the jury received regarding evidence of King's voluntary intoxication was inadequate as a matter of law and requires reversal of the judgment, either because the trial court failed to perform its sua sponte duty to fully instruct the jury or because his trial counsel failed to request adequate instructions.

1. *Background*

The list of proposed instructions that the prosecution filed during trial did not include any instruction regarding evidence of King's voluntary intoxication. King's list of proposed additional jury instructions did include CALCRIM No. 3426 which is entitled "Voluntary Intoxication (Pen. Code, § 22.)"

As noted earlier in our opinion, the majority of the discussion about jury instructions was not reported. However, on the morning of October 17, 2007, the trial court made a record of the instructions that would be given and the parties had the opportunity to state objections. Immediately prior to that proceeding, an in-chambers conference was held outside the presence of the prosecutor and the jury. The proceeding was reported because defense counsel wanted the following exchange to be included in the record:

"[Defense Counsel]: Your honor, what I wanted to put on the record before I do my closing argument is that pursuant to Mr. King's instructions, I'm not going to ask the jury to convict of any lesser included offenses. Specifically, voluntary or involuntary manslaughter. Mr. King and I had a discussion prior to trial about these issues. That arguing for a straight self-defense can sometimes polarize the jury thinking that they – they only have a choice between what the DA asks for and what the defense attorney asks for. I've told him that, in some cases, it's a good strategy to argue to the jury that they might convict of voluntary manslaughter . . . .

"The Court: And involuntary manslaughter?

"[Defense Counsel]: We actually didn't get that far, but involuntary manslaughter, Mr. King, could get you up to four years in prison. [¶] Do you understand that?

"The Defendant: Yes.

"[Defense Counsel]: And you want me to argue for a straight not guilty by reason of self-defense, is that right?

"The Defendant: Yes.

"[Defense Counsel]: And I've explained this to you before trial?

"The Defendant: Yes.

"[Defense Counsel]: And [the defense investigator] and I explained it to you again this morning?

"The Defendant: Yes.

"[Defense Counsel]: Okay. So for that reason, your honor, I cannot ask the jury to convict of a lesser included offense without my client's consent, because that's like me – I think that's inadequate representation. If my client says I want to argue – I want a straight not guilty, I don't have the legal authority to go beyond my client's wishes and argue for a lesser included offense. If he doesn't want me to do so, I'm not going to do it.

"The Court: Notwithstanding that, you understand the jury can convict you on a lesser included offense anyway, Mr. King? [¶] Do you understand that?

"The Defendant: Yes. . . .

"[Defense Counsel]: We also talked about that. [¶] We're not foreclosing the jury finding a lesser included by following the jury instructions. I'm just not going to actively advocate for that.

"The Court: Very Well. I don't think I need to say anything else. [¶] That is your choice Mr. King?

"The Defendant: Yes.

"The Court: That [defense counsel] argue the case in the way he's presented it this morning?

"The Defendant: Yes, Mr. Parsons.

"The Court: And as a matter of trial tactics, [defense counsel], and effective representation of Mr. King, you are acceding to your client's wishes and will be arguing self-defense?

"[Defense Counsel]: That's correct."

After the in-chamber session was concluded, the court and parties reconvened in the courtroom so that the court could identify the instructions that would and would not be given and the parties could state their objections. When it reached the subject of voluntary intoxication, the court made the following statement: "There are two voluntary intoxications that were submitted. The court refused 3426 and will be giving 625."

Although we cannot determine from this record whether the prosecutor or the defendant proposed CALCRIM No. 625, there was no objection to the decision to give CALCRIM No. 625 instead of CALCRIM No. 3426. CALCRIM No. 625 is entitled "Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 22)." The Judicial Counsel describes CALCRIM No. 625 as a "specific application" of CALCRIM No. 3426 to homicide." (CALCRIM No. 625, Related Issues, p. 421.)

The jury was given the following instruction based on CALCRIM No. 625:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose."

2. *The Trial Court's Duty*

Although King does not challenge the propriety of CALCRIM No. 625, he argues that giving that instruction was insufficient under the circumstances of this case. According to King, the trial court had a sua sponte duty to instruct the jury further, i.e., to

the effect that voluntary intoxication evidence was also relevant to the questions whether King acted with a mental state that would have made him guilty of voluntary manslaughter rather than murder or of involuntary manslaughter rather than voluntary manslaughter or murder. King is mistaken.

The trial court's sua sponte duty to instruct on all material issues presented by the evidence extends to defenses which are either (1) relied on by the defendant or (2) supported by substantial evidence and not inconsistent with the defendant's theory of the case. (*People v. Breverman, supra,* 19 Cal.4th at p. 157; see also *People v. Whitler* (1985) 171 Cal.App.3d 337, 342, conc. opn. of Sims, J., [trial court has a "sua sponte duty to give instructions relating a recognized defense to elements of a charged offense."].)

However, voluntary intoxication is not a defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 (*Saille*).) Evidence of intoxication is "relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state." (*Ibid.*) Instructions that relates voluntary intoxication evidence to legal issues in the case are pinpoint instructions which must be given "upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Ibid.*; *see also People v. Rundle* (2008) 43 Cal.4th 76, 145 (*Rundle*), overruled on other ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Bolden* (2002) 29 Cal.4th 515, 559.)

King contends that, even if there was no initial duty to instruct regarding voluntary intoxication, once the trial court in this case made the decision to give CALCRIM No. 625 regarding the effect of intoxication on the mental state elements of first degree murder, and also to instruct on the lesser included offenses of murder, it necessarily assumed a sua sponte obligation to fully instruct the jury regarding the effect of intoxication evidence on the mental state elements of the lesser offenses. Absent such instruction, King contends, the instructions were misleading and incomplete.

This precise argument was rejected in *Rundle, supra,* 43 Cal.4th at page 145, because, as the court explained, accepting it would "in effect, overrule our decision in

Saille." In *Saille, supra*, 54 Cal.3d 1103, the jury was instructed that voluntary intoxication evidence could be considered in determining whether the defendant had the specific intent to kill. Although the jury was also instructed on second degree murder and voluntary and involuntary manslaughter, the trial court did not relate voluntary intoxication to anything other than the specific intent to kill. (*Id.* at p. 1108.) The *Saille* Court held that the trial court did not have a sua sponte duty to give those additional pinpoint instructions. (*Id*. at pp. 1119-1120.)

3. *Effectiveness of Trial Counsel*

King next contends that his trial counsel rendered ineffective assistance because he did not request pinpoint instructions regarding the relevance of intoxication evidence to the mental state elements of the lesser included offenses of murder.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

King's efforts to establish that his trial counsel performed deficiently are doomed by two important rules. First, there is a strong presumption that trial counsel's conduct falls within a wide range of reasonable professional assistance and, second, as a reviewing court, we must defer to trial counsel's reasonable tactical decisions. (See, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 436; *People v. Holt* (1997) 15 Cal.4th 619, 703.)

The defense theory, presented by King's own testimony, was that King killed Vasquez in self defense and, therefore, was guilty of nothing. King testified that Vasquez attacked him with a broken beer bottle, threatened to kill him and would not let him leave. King feared for his life and struck Vasquez so that he could get away. When King described this alleged attack by Vasquez for the jury, he did not claim that his perceptions were impaired or that he acted out of passion.

The defense theory was absolutely inconsistent with the prosecution case. According to Miranda, King brutally and intentionally beat a man who was passed out on

the living room floor. This was a case where the jury had to chose one version of the event and could not have found that the truth lied somewhere in the middle. Under these circumstances, the defense made a reasonable tactical decision to attempt to garner support for its version by seeking a defense verdict and by not discussing or drawing the jury's attention to the option of convicting on one of the lesser offenses.

The record shows that King himself instructed his attorney to argue for straight self defense. After defense counsel, the defense investigator and, to a lesser extent, the trial court all discussed the disadvantages of this approach with the defendant, King remained committed to his position. That position was not objectively unreasonable.

Under all these circumstances, there was a sound tactical reason to not request pinpoint instructions regarding the potential relevance of intoxication evidence to the lesser offenses of murder. Those instructions would have been at odds with the defense strategy. Further, highlighting the intoxication evidence for the jury could have led it to conclude that Miranda's version of the event was more likely. In any event, such instructions would have drawn the jury's attention to evidence supporting convictions on the lesser offenses. Therefore, even if the intoxication evidence would have supported pinpoint instructions, defense counsel had a sound tactical reason for not requesting them.

D. ***The Jury's Question***

King's final contention is that the trial court failed to give an "appropriate instruction" in response to the following question posed by the jury during its deliberations: "Can CalCrim 625 only be applied to 1st Degree Murder or can it be considered on a charge of 2nd Degree murder or manslaughter?" The jury was provided with the following response: "Voluntary intoxication may be considered in deciding whether the defendant acted with deliberation and premeditation (1st degree murder) and/or whether the defendant acted with express malice. [¶] You may not consider voluntary intoxication for any other purpose."

If a deliberating jury seeks instruction "on any point of law arising in the case," the trial court has a statutory obligation to provide the instruction. (§ 1138.) In fulfilling this obligation, the court's "primary duty [is] to help the jury understand the legal

principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Applying these rules to the present case, we find that the trial court's response to the jury's question was both accurate and adequate. The court reiterated the substance of CALCRIM No. 625 which, King does not dispute, constitutes an accurate instruction regarding the relevance of voluntary intoxication evidence to homicide crimes. The court also clarified that such evidence was relevant to both the specific elements of first degree murder, i.e., deliberation and premeditation, as well as the express malice elements of the other homicide charges.

King contends that the trial court had an obligation to expressly relate the concepts embodied in CALCRIM No. 625 to the mental state elements of the lesser offenses of murder. However, as discussed above, the court had no sua sponte duty to give such pinpoint instructions to begin with and King fails to explain how or why the jury's question gave rise to such a duty. Furthermore, by that point the court had already been expressly advised of the defense decision to attempt to put the jury to the hard choice of convicting King of murder or finding him not guilty of anything. Under those circumstances, the court did not abuse its discretion by determining that additional explanations were not appropriate.

King also contends that his trial counsel was ineffective to the extent he did not object to the court's answer or request pinpoint instructions regarding the mental states of the lesser included offenses. As a preliminary matter, we note that the record does not disclose how either counsel reacted to the jury's question or the extent of the attorneys'

input regarding the answer that was ultimately given. Under these circumstances, King is hard-pressed to overcome the strong presumption that trial counsel acted within the wide range of reasonable professional assistance. This is particularly true here, when, as explained above, the answer to the jury's question was accurate and adequate under the circumstances. In any event, as discussed above, the pinpoint instructions that King advocates for on appeal were inconsistent with his defense theory and trial strategy. King cannot carry his burden of proving that trial counsel performed deficiently by electing not to abandon that strategy at that late stage in the proceeding.

King contends that there could be no strategic reason for failing to request additional pinpoint instructions because, according to King, the jury's question showed that it was looking for a way to convict him of manslaughter instead of murder. King simply ignores the fact that the court's answer did clarify for the jury that the intoxication evidence could be relevant to the question whether the defendant was guilty of manslaughter instead of second degree murder by reminding it that such evidence was relevant to the determination "whether the defendant acted with express malice." Furthermore, to the extent the jury's question suggested that it was reluctant to convict of murder, it could also have been a sign that the defense strategy was working. Indeed, a pinpoint instruction regarding the effect of intoxication on a lesser included offense given for the first time at that late stage in the proceeding could have been interpreted as a concession that King was guilty of a crime.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.